[2017] UKFTT 617 (TC)

TC06053

Appeal number: TC/2016/02404

MONEY LAUNDERING REGULATIONS – whether person effectively directing money service business applicant satisfied fit and proper test – no-appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MUNATSI LOGISTICS LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JOHN WOODMAN

Sitting in public at the Nottingham Justice Centre on 10 and 11 April 2017

Eddington Kudzai Munatsi, director of the appellant, for the Appellant

Joseph Millington, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and Background

1. Munatsi Logistics Limited, the appellant, appeals against HMRC's decision dated 18 February 2016 (confirmed after a review dated 8 February 2016) refusing the appellant registration under the Money Laundering Regulations 2007 (the "ML Regulations") on the basis that Mr Munatsi, the sole director of the appellant had failed the fit and proper test. The decision was reached on the basis of background information relating to Mr Munatsi's tax returns for 2010-11 and 2011-12 and the fact that Mr Munatsi had been charged deliberate inaccuracy penalties which he had not challenged.

2. The appellant appeals the decision arguing that Mr Munatsi is a "fit and proper" person for the purposes of the ML Regulations, submitting that the inaccuracies which gave rise to the penalties were not deliberate and the penalties were not challenged as Mr Munatsi did not want to prolong the stress and anxiety caused by the dispute but wanted to get on with running his business. While it is accepted that the way Mr Munatsi ran his business at the time was disorganised, the appellant submits appropriate steps have since been taken to resolve any shortcomings and that Mr Munatsi has learned from his errors.

Evidence

3. On behalf of HMRC we heard evidence from Mr Browning, the HMRC officer who made the review decision under appeal, and Mr Thevarajan, the officer who enquired into the returns in relation to which penalty determinations were made which in turn gave rise to HMRC's concerns as to whether Mr Munatsi satisfied the fit and proper test. Mr Munatsi, the sole director of Munatsi Logistics Ltd gave evidence on his own behalf. Each of the witnesses were cross-examined by the opposing party and assisted the tribunal with its further questions. We found all of the witnesses to be honest and credible witnesses of fact. We also had before us a bundle containing the exhibits to the witness statements and which included correspondence between the parties in relation to the application for registration, the previous penalties charged, and documents and policies of the money transmitters in relation to whom Mr Munatsi had acted as an agent together with details of the degree studies he was undertaking to improve his business and other skills.

Law

4. The statutory legal provisions which are relevant to the time period in this appeal, namely the Money Laundering Regulations 2007, as subsequently amended, were set out in Mr Millington's skeleton argument and we gratefully adopt his summary, (noting in passing that subsequent to the hearing and as from 26 June 2017, a new set of regulations, the Money Laundering Regulations 2017 came into force from that date).

5. The Commissioners of Revenue and Customs are the supervisory authority in respect of the appellant (Regulation 23 (1)(d)). Regulation 25 provides that the

Commissioners must maintain a register of money service businesses for which they are the supervisory authority (Regulation 25(1)(b)), and no person may act as a money service business unless included in the register (Regulation 26(1)(b)). Regulation 27 provides for the form of applications for registration.

6. Regulation 28 (which was amended with effect from 1st October 2012 by the Money Laundering (Amendment) Regulations 2012), contains the 'fit and proper' test, which forms the subject of this appeal and provides:

> "(1) The Commissioners must refuse to register an applicant as a money service business or trust or company service provider if they are satisfied that—
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> (a) the applicant;
>
> (b) a person who effectively directs, or will effectively direct, the business or service provider;
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> (c) a beneficial owner of the business or service provider; or
>
> (d) the nominated officer of the business or service provider,
>
> is not a fit and proper person with regard to the risk of money laundering or terrorist financing."

7. In the present case, as director of the appellant, Mr Munatsi was the person 'who effectively directs, or will effectively direct, the business or service provider,' and as such was subject to the 'fit and proper' test. (We should point out, given that Mr Munatsi had referred in his earlier correspondence to not having been convicted of a listed offence that the previous version of Regulation 28 contained a list of offences and that an applicant would fail the "fit and proper" test if he or she were convicted of any of the listed offences. It is not in issue that the applicable test in this appeal is the one set out in the paragraph above).

8. Regulation 30 provides:

> "(1) The Commissioners must cancel the registration of a money service business or trust or company service provider in a register maintained under regulation 25(1) if, at any time after registration, they are satisfied that he or any person mentioned in regulation 28(1)(b), (c) or (d) is not a fit and proper person within the meaning of regulation 28."

9. In circumstances where the Commissioners determine that the relevant person is no longer a 'fit and proper' person, Regulation 30 continues:

> "(3) Where the Commissioners decide to cancel a person's registration they must give him notice of—
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> (a) their decision and, subject to paragraph (4), the date from which the cancellation takes effect;
>
> (b) the reasons for their decision;
>
> (c) the right to a review under regulation 43A; and

(d) the right to appeal under regulation 43.

(4) If the Commissioners—

(a) consider that the interests of the public require the cancellation of a person's registration to have immediate effect; and

(b) include a statement to that effect and the reasons for it in the notice given under paragraph (3),

the cancellation takes effect when the notice is given to the person."

10. The appellant was provided with the offer of a review of the original decision (in accordance with Regulation 43A), which he accepted. The decision was upheld on review, and the Appellant was notified of this outcome by letter dated 8th April 2016.

11. The right to appeal to the Tribunal against a decision to cancel the registration of a registered person is contained at Regulation 43(1)(b). The powers of the Tribunal on any such appeal, are contained in Regulation 43(4), which provides:

"(4) A tribunal hearing an appeal under paragraph (2) has the power to—

(a) quash or vary any decision of the supervisory authority, including the power to reduce any penalty to such amount (including nil) as it thinks proper, and

(b) substitute its own decision for any decision quashed on appeal."

12. The approach of the Tribunal to an appeal under Regulation 43(4) was outlined in *Hunt -v- The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 1094 (TC). At [24] to [25], the FTT (Judge Herrington and Sandi O'Neill) observed:

"[24] It is common ground that the effect of Regulation 43(4) is that the Tribunal has in relation to an appeal under Regulation 28 full power to decide for itself afresh as to whether in the light of all the evidence and circumstances before it the appellant is not a fit and proper person for the purposes of the Regulations. Consequently, if it allows the appeal the effect will be that HMRC would be bound to register the person concerned under Regulation 27.

[25] We note from the wording of Regulation 28 that HMRC are bound to refuse registration if they are satisfied that the person concerned is not fit and proper. That suggests the burden is on HMRC to establish whether the person is not fit and proper, having assessed the information before them, including any further information they obtain pursuant to Regulation 27(2) (d) (ii), rather than for the relevant person to satisfy HMRC of his fitness and properness. On the basis that the Tribunal has full jurisdiction to substitute its own decision for that of HMRC, it appears to us that the Tribunal should take the same approach as HMRC is bound to under Regulation 28, that is it should allow the appeal unless it is satisfied that the appellant (in this case Mr Hunt) is not a fit and proper person."

13. HMRC, therefore, bear the burden of demonstrating that Mr Munatsi is not a 'fit and proper' person.

Background / Facts

The appellant company, Mr Munatsi and the money laundering regulations registration applications

14. The appellant company, based in Nottingham, provides freight forwarding services. It collects goods from UK based customers for distribution overseas using carriers such as UPS, Interlink, TNT and DHL and Air Menzies International, in particular arranging transport of goods to Zimbabwe which is where Mr Munatsi was born and educated. The company wished to engage in money transfer activities, charging customers a commission to send funds to overseas end receivers. (This is a "Money Service Business" for the purposes of "the ML regulations"). The company is required to be registered and registration subject to persons who effectively direct the business to pass a "fit and proper" test. Trading under the name Swiss Global Finance, Mr Munatsi also acts as an agent for Western Union and MoneyGram.

15. Mr Munatsi had previously carried on business as a sole trader. On 26 July 2010 Mr Munatsi passed the "fit and proper" test; he was registered under the regulations from 26 July 2010 to 28 July 2011 when his business ceased trading. On 23 May 2012 the appellant, Munatsi Logistics Limited was incorporated. Mr Munatsi is its sole director. The company was registered for VAT with the trade classification "sea and coastal freight water transport" with effect from 1 July 2012.

16. On 1 February 2016 Mr Munatsi made his application to HMRC for registration (form MLR100) providing basic contact information in relation to the company and himself and ticking boxes confirming which Money Laundering Regulation activities ("money transmitter" within the category of "Money Service Business") were conducted.

17. In accordance with HMRC's practice Mr Munatsi was re-examined under the "fit and proper" test as more than 12 months had been passed since he had last undergone the test. The test was carried out by HMRC Officer, Stephen Browning who having conducted various background checks including those in relation to information that HMRC held, noted what he regarded as adverse information in relation to Mr Munatsi's tax returns for the years 2010-11 and 2011-12. He considered summaries on HMRC's systems that penalties had been charged on the basis of inaccuracies in Mr Munatsi's returns which had under-declared income and noted in particular that the penalties were based on the inaccuracies being deliberate. The penalties had not been challenged. His assessment was that such deliberate behaviour conflicted with how a fit and proper person would conduct themselves; the applicant's behaviour in deliberately under declaring income significantly increased risk factors in terms of potential money laundering and/or terrorist financing. Mr Browning made his decision by reference to an internal "risk matrix" document. In cross-examination it was explored whether this document contained further information than that which was in the documents disclosed in HMRC's penalty summary document. Mr Browning confirmed it did not and we accept that it did not. (We note in passing that to avoid any perception on the part of an applicant that decisions were being made for undisclosed reasons it would have been beneficial to have disclosed the document). Mr Browning notified his decision to Mr Munatsi on

18 February 2016 which mentioned "It has now come to our notice that between 2010 and 2012 you deliberately omitted to declare earnings relating to your annual tax returns". The decision was reviewed upon Mr Munatsi's request but upheld in a decision given on 8 April 2016 by Officer Manjit Dhillon.

18. The further detail and background to the enquiries into those returns and the penalties is set out below together with other matters in relation to the way Mr Munatsi carried out his business which HMRC referred in furtherance of their submission that he did not satisfy the "fit and proper" test.

Information requests and Tax Penalties

19. On 19 December 2013 an HMRC compliance officer, Mr Thevarajan, opened a s9A Taxes Management Act 1970 enquiry into Mr Munatsi's return for 2011-12 and began corresponding with Mr Munatsi's agent, Audra Wynter at Wyntax Consultancy. He sought sales records, commission statements and bank statements for the period in question. At the outset we should mention that while the appellant sought to highlight Mr Thevarajan's inexperience as a new compliance officer working his first case, there was nothing we saw in his handling of the case that indicated an approach that was anything other than diligent.

20. On 26 February 2014 he received some records but not all of them e.g. he did not get bank statements for the period 19 January 2012 to 5 April 2012 or sale and commission records. When reviewing the bank statements he noticed commission income from Ria Financial being credited (which had not appeared in turnover). He also saw a letter indicating Mr Munatsi had been involved with Western Union. He telephoned Wyntax on 20 March 2014 and then sent a statutory information request (under Schedule 36 Finance Act 2008) for the outstanding bank and commission statements and sales records. The information was not received and on 9 June 2014 he issued a £300 penalty for the failure to provide the information. On 11 July 2014 he received the information which included Western Union commission statements showing profits which did not appear to be reflected in Mr Munatsi's accounts. Mr Thevarajan also identified that at least four purchases of cars had been made.

21. On 29 October 2014 Mr Munatsi and his agent met with Mr Thevarajan and another Revenue colleague, Mrs C Brown, to discuss the return. Mr Munatsi confirmed he received £6313 commission profit from Western Union and Ria in 2011/12 which was not declared in his accounts. HMRC prepared a note of meeting. The note did not purport to reproduce word for word what was said and it was signed afterwards by Mrs C Brown on 10 November 2014, Mr Thevarajan on 12 November 2014 and Mr Munatsi on 15 December 2014.

22. Mr Munatsi confirmed the non-declaration of the money transfer commission dated back to 2008 but was very low. Mr Thevarajan accordingly on 5 March 2015 extended his enquiry back to 2010-11 and asked for commission statements for this period and on 12 November 2014 asked for bank statements.

23. Mr Munatsi also confirmed at the meeting that he had bought and exported cars and trucks. He stated he was uncertain as to who he had bought the cars from and confirmed the transactions were not declared in his accounts or return.

24. As regards the information passed on to the accountant, she was reported at the meeting as saying she only received the Profit & Loss and expense statements for the air freight business. She did not have access to the business bank statements. Apart from his Lloyds business account Mr Munatsi also had a Natwest personal account.

25. On 18 December 2014 following a request that had been made for information on 12 November 2014 Mr Thevarajan issued another information notice relating to the car transactions and bank records.

26. Once the commission statements from Western Union were received they revealed the following amounts were earned by Mr Munatsi but not declared on his return:

(1) 2009-10 - £4,777

(2) 2010-11 - £5,394

(3) 2011-12 - £6,313

27. The adjustments of additional tax and NICs due for 2010-11 were £572.60 and £470.80 for tax and NICs, and for 2011-12 the figures were £3396.80 and £1528.56 (no adjustments were required for 2010-11 because of the extent of losses). The total amount of outstanding income tax and NICs was £3396.80 and £1528.56.

28. On 29 July 2015 Mr Thevarajan sent out revised tax computations relating to his car trading profits. The amount of £4250 was based on an assumed profit mark up of £1000 on each car based on what had been disclosed at the 29 October 2014 meeting and allowable expenditure of £150 on each car. The figures were based on assumed and estimated amounts as Mr Munatsi had not kept detailed records of the transactions.

29. At the same time Mr Thevarajan also imposed various penalties: For 2010-2011 an inaccuracy penalty of £474.74 and for 2011-12 penalty of £942.89. These were for the failure to declare commission he received from money transfer business in Mr Munatsi's Self-Assessment tax returns. A penalty of £603.92 was also imposed in respect of 2010-11 for the failure to declare income generated from a new business of buying, exporting and selling cars on his Self-Assessment return.

30. Mr Thevarajan imposed the penalties on the basis of his belief that Mr Munatsi had deliberately omitted the income. Mr Thevarajan's reasoning was based on his view that Mr Munatsi received three years' worth of commission, which were not declared to his agent despite bank statements showing profits from Ria and because netted off commission were either credited to his own bank account or used to pay for personal bills implying Mr Munatsi knew how much profit he was making but had decided not to declare it in his accounts and tax return. As indicated above Mr

Munatsi disputes the errors were deliberate and we consider this issue further in the discussion section of our decision which follows below.

31. On 18 August 2015 Mr Munatsi's agent responded as follows:

> "We refer to your letter of 29th July 2015 enclosing adjusted tax proposals and penalty letter with explanations.
>
> We can confirm we are in agreement with the adjusted tax proposals and penalty computation. We now look forward to receiving the enquiry closure notices."

32. Mr Munatsi's evidence, which we accept, went into the reasons underlying his decision to concede the penalty and pay both it and the outstanding tax. He accepted at the time that he had been ignorant and lacked organisation skills and that the penalty was in his view fair as it reflected those shortcomings. He regarded the enquiry and penalty proceedings as time-consuming and expensive (in terms of the bills he was having to pay his accountant to represent him). The stress and worry he suffered was affecting his work and his studies; he feared losing his business and he therefore was relieved when the matter was over. While Mr Munatsi's agent had asked HMRC if the penalty could be suspended HMRC did not agreed to this; their policy was that suspension was not appropriate in cases where the inaccuracy was deliberate.

33. Following our consideration of the documents and the oral evidence we heard we make the following findings regarding Mr Munatsi's businesses and financial dealings (anonymising where appropriate the details of particular individuals or small businesses with whom he dealt).

34. In relation to the air freight business Mr Munatsi explained customers would either bring parcels into the shop or Mr Munatsi would collect them by van. Customers paid mainly by cash at the premises and Mr Munatsi would deposit the cash as soon as possible, or else transfer money straight into his Lloyds business account. Invoices were recorded onto the computer to give to the customer. Each individual sale would be uploaded onto the bespoke software to create the Profit and Loss report. Mr Munatsi said he did not distinguish when depositing the money between the freight forward money and money relating to the money transfer business. Both sorts of money went into the same business bank account.

The money transfer business and "netting off" of commission

35. As regards the money transfer business a typical transaction ran as follows: Customers would get a quote for the transfer. Mr Munatsi received the cash and then acquired the receiver details. He would then deposit the money into the Western Union account which would then be sent to the end receiver who would then withdraw the money. Mr Munatsi's commission was 15% of the transaction fee paid by the customer. In other words if a customer wanted to send £100 and the commission was £5 the customer had to pay £105. £5 was retained by Western Union and at the end of the month Western Union owed Mr Munatsi 15% of the £5 (£0.75).

36. Western Union therefore effectively offered credit in relation to the transferred amount; so Mr Munatsi would owe Western Union larger sums which when he settled would be paid net of the commission owed by Western Union to him. With RIA the commission was 12%. They required payments owing by Mr Munatsi to be made weekly but would also net off the commission they owed him on a monthly basis.

37. Mr Munatsi says he provided his accountant with his business accounts. He assumed the accountant would work out what money was coming in and out and that she would be able to see there was extra money but would not want to know where it was coming from.

38. He was reported in the note of meeting as stating that:

> "his commission income would not be paid into his business account. Instead it would be netted off to what he owed the Western Union. For example if he owed Western Union £2000 he would take the commission out of what the customer gave him and pay it into his bank account or spend it on personal bills."

39. In his evidence Mr Munatsi explained:

> "..all actual money coming in or going out remained circulating with the rest of the money between my personal and business accounts. I incorrectly assumed that during the tax calculation whatever excess money would be the income from the money transfers."

40. When asked by Mr Thevarajan at the 29 October 2014 meeting where the money transfer income was in shown in the accounts Mr Munatsi was reported as admitting that he had left off the income from his accounts and tax returns:

> "[Mr Munatsi] said this was overlooked. Mr Munatsi said he was struggling financially and it was difficult to manage his business thus he overlooked passing this information to the agent and to put it in his return."

41. In cross-examination Mr Munatsi said his accountant knew about the money transfer business from "day 1". He insisted that the note of meeting which suggested his accountant did not have access to his business bank account was incorrect - it was correct that she did not have access to his personal account. He later conceded that he must not have given her bank statements for the period 19 January 2012 to 5 April 2012 as the accountant had not been able to provide those when Mr Thevarajan had later asked for bank statements.

42. Mr Millington, for HMRC, suggested that when customers paid in cash that the money on the way to Western Union was never "touched by" a bank account.

The car business:

43. Mr Munatsi was persuaded by a contact in the motor trade business to source and purchase cars in the UK on behalf of individuals in Zimbabwe and export them with a profit margin built into the transaction. He found the reality to be that the margins

were small and were eaten up by storage, transport and customs costs. He therefore abandoned the venture.

44. At the meeting with HMRC he explained what would happen in more detail. A customer from Zimbabwe would find a car and Mr Munatsi would pay for it by giving the money to individual *A* of [*XX*] Business who would source the car. The car would then be exported with the costs being met by Mr Munatsi and customers would Mr Munatsi the money via instalments in bank transfers. Mr Munatsi indicated that the trade was making a loss and that individual "was always asking for money and [Mr Munatsi] believed he was acting fraudulently". Mr Munatsi said he tried to get some of the money he paid out but could not and also that some customers would not pay for the car and would go missing. Although at the hearing Mr Munatsi described individual A as a "big fraudster" we regarded these words as exaggerated language reflecting a business relationship that had soured; the only factual allegation was that the individual had come up with expenses that did not exist and it was clear to us Mr Munatsi's opinion of the individual was only reached with the benefit of hindsight. By way of context Mr Munatsi explained the "dealer" mentality in Zimbabwe namely that the business background Mr Munatsi had been familiar with there was one where, given the difficult economic environment, people needed to try to turn a quick profit on whatever one-off transactions or business opportunities became available and with minimal formality. He explained the environment was that you did not need much to deal with someone just their word. No checks were made on where the customers were getting the money and he did not see the cars. The only records Mr Munatsi kept were the e-mail correspondence and text messages with the individual.

Specific money transactions

45. At the meeting certain specific money transfers were also enquired about. The note recorded:

> "[Mr Thevarajan] asked about two transactions with [*Individual A*] and [*Individual B*] (same person) worth £17272 and £8190 [Mr Munatsi] said he received stage payments from customers into the business bank account."

46. At the hearing Mr Munatsi clarified that [*Individual A*] and [*Individual B*] were two actually two different people not the same person as the note had set out. He described the individuals as working together as "one unit".

47. It was also mentioned that £43205 came in from [*Individual C*] over the space of nine days. Mr Munatsi said this related to his money transfer business where the individual, a Zimbabwean living in London, was buying a house and needed to transfer money via Western Union. In cross-examination he explained he had not met the customer but that her documentation had been in order.

48. There was also discussion of a payment from £8503.31 from "*[YY Business] – [First-name of Individual D]*" and £7822.76 from [*Individual D*] – the same person who ran [*YY Business]*. Mr Munatsi explained this was an individual who ran a similar money transfer business to Mr Munatsi but where the individual did not have

their own Western Union account. The arrangement with the individual was that commission would then be split. Mr Munatsi could not help the tribunal with understanding how the split happened in practice.

49. In cross-examination Mr Munatsi explained the individual passed the Western Union compliance checks, he treated *YY Business* and *Individual D* as his customers and did not concern himself with the customers' customer. He did not know why some transactions were personal and some were done under a business name.

50. Regarding the difficulties HMRC complained of in getting information, Mr Munatsi's view was that he had his agent did their best to provide what was requested but where they relied on others it took time to obtain these. Organisational changes occurred with Western Union (converting we understand from one entity to another) – there was a change in database, the portal was closed, and to get the records enquiries had had to be made through their compliance department). As to the difficulties obtaining missing bank statements Mr Munatsi explained he had closed his Lloyds business account and opened a new one with Barclays in the name of the company. He was therefore having to obtain information from a bank in relation to which he was no longer their customer.

The appellant's activities since. His plans. His attitude to what has happened and what he wants to do next.

51. Mr Munatsi had been an agent of Western Union and MoneyGram since 2008. He was required to attest and comply with ML Regulations on an annual basis. In 2012 having recognised that he needed to become more organised he took advice and changed his status from a sole trader to a limited company and registered for VAT. In Mr Munatsi's view his record keeping and financial management methods are significantly improved – he put forward a letter of support from his accountants.

52. In the last four years Mr Munatsi has grown his business so that he now has three employees. He has undertaken, and as at the date of the hearing, almost completed an Open University BA Hons degree in Business Studies and Law. He explained he wanted the registration under the ML Regulations to able to reduce the money transfer costs he currently incurs from his current bank in expanding his logistics and freight business. In cross-examination he explained his plan was to build a similar portal to Western Union and that the FCA would help him come up to standard. He did not have any anti-money laundering policies of his own because acting as an agent for Western Union there was no need for him to have extra policies. Once registered his intention was to copy and paste theirs.

Parties' submissions

53. HMRC point to the fact significant amounts of income went undeclared. He appeared to receive monthly commission statements from Western Union – it is not credible, say HMRC, that he simply overlooked telling his representative about the commission received whether as the result of poor record keeping or misunderstanding. He was aware he had to pay tax on profits through his agent filling

out self-assessments and it must have been obvious to him that he was doing a trade that resulted in significant income to him (and which he seeks to rely on to show he is fit and proper) in the context of his declared earnings. So far as his agents were concerned the money transfer trading was invisible; they did not have access to personal accounts and had no access to business accounts – there was therefore no means for them to identify profit from the money transfer business. His further failure to declare any income from his car sales business (a significant departure from his other trading activities and something which would stick in his mind) further undermined his assertion that any errors were the result of a lack of sufficient understanding or adequate record-keeping. Although the appellant had suggested incorporation meant "all change" – there were no documents provided in support. Also he filed a return in January 2013 which was inaccurate despite any changes having been put in place. The appellant's co-operation was reactive, and bank statements were lacking. A reasonable person who disputed the deliberate conduct penalties would have challenged them.

54. Furthermore certain other money transfer transactions that were carried out gave cause for concern involving large money amounts for another money transfer outfit, lack of satisfaction as to provenance, and not questioning why some transfers were in the individual's name rather than under the trading name. Mr Munatsi admitted he had a "dealer" mentality and was driven by nothing more than profit in that he traded with someone he suspected of being fraudulent. He did not actually see the cars he was exporting and sent large amounts of money internationally without knowing their source.

55. As regards the current systems he had in place HMRC point out that he is entirely reliant on Western Union's automatic systems - their area manager visits and compliance – he has adopted no policies and procedures in his own right. The ML Regulations on due diligence, ongoing monitoring and enhanced due diligence when no customer is present need to be taken into account particularly where word of mouth advertising is relied on - there was no evidence of sufficient understanding / robust implementation of anti-money laundering policies on his part so as to avoid his becoming involved in a web of money laundering.

56. The appellant says the under-declarations were not deliberate – they were errors resulting from a genuine lack of organisational/commercial skills and ignorance his part. He did not think to report the trade in cars because as far as he was concerned no profit had been made. Regarding the provision of information, Wyntax his accountant gave what they could seeking extensions to deadlines where there were difficulties in obtaining the requested information. He emphasises he was co-operative.

57. Mr Munatsi did not appeal because he thought the penalty was fair as it reflected his ignorance and lack of organisational skills. Any reasonable person would have conceded given the time, stress and expense of taking the matter further. In his case it was affecting his work and it seemed sensible to pay up and move forward.

58. As regards the changes in organisation he made, these happened gradually. While the under-declaration arose in January 2013 it came about from a lack of records in the earlier period of 2011-12.

Discussion

59. If we are satisfied that Mr Munatsi is not a fit and proper person then we must dismiss the appeal. If we are not so satisfied on the basis of the material before us we should allow the appeal. We consider in turn the significance of the various issues put forward by HMRC as suggesting the appellant is not fit and proper, the appellant's case on what changes and systems he has since put in place and then consider the cumulative picture painted by those elements.

60. HMRC rely on deliberate under-declaration tax penalties and say those were accepted by Mr Munatsi. It was clarified at the hearing that HMRC's case did not go as far as arguing that the tribunal was prevented from taking its own view on the circumstances surrounding the imposition of the penalties (on the grounds of it being an abuse of process to litigate matters which were regarded as determined); it was accepted it was relevant to consider the facts and circumstances of the penalties and indeed HMRC sought, in furthering their case, to do precisely that. We note this acceptance is in line with the relevant case law. As noted by the FTT (Judge Berner) in *Lindsay Hackett v HMRC [2016] UKFTT 0781 (TC)* at [38] having considered Lord Bingham's explanation of the principle of abuse of process in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, at p 31 "…what is required is a broad, merits-based judgment, taking account of all the facts and circumstances."

61. Although HMRC say it is simply not credible that Mr Munatsi did not know the returns that were filed on his behalf were inaccurate we accept his evidence to the contrary. The fact that Mr Munatsi's accountant would not in fact have been able to work out what his income from the money transfer business was with the information that was provided does not preclude a finding that Mr Munatsi had wrongly assumed that to be the case. Mr Munatsi's evidence was subject to a lengthy and rigorous cross-examination but ultimately there was not anything that emerged from his account that called us to question his credibility. Mr Munatsi was frank in acknowledging any deficiencies in the way he had ran his business and with the benefit of hindsight the errors of judgment he had made in deciding who to transact with. While it is correct there were several discrepancies between the account reported in the meeting note of 29 October 2014 and Mr Munatsi's evidence at the hearing the explanations given and the context of the notes mean the inconsistencies do not undermine his credibility. The note of meeting did not purport to be a word for word account of what was said and, although it is correct Mr Munatsi signed it, he did so some six weeks later on 15 December 2014. Although it was stated in the note that the accountant had stated she did not have access to the business bank statements, the fact that she was able to send some of those statements upon request is not inconsistent with her having them at the outset. Another inconsistency, but one which we do not regard as significant given the note did not purport to be a word for word account, was that at the meeting Mr Munatsi was reported as saying regarding the money transactions that references to two different names were in fact the same

individual whereas at the hearing Mr Munatsi explained that were in fact two different people but who worked together. While the meeting note recounted that Mr Munatsi had said he was struggling financially and that therefore he overlooked passing information to his agent to put on his return we accept Mr Munatsi's evidence given to us at the hearing that this was not the case; he had simply overlooked printing the commission statements wrongly assuming the accountant could figure out the income – there was no conscious decision on his part to not pass on information and therefore no link between his sense of struggling financially and omitting to forward the information.

62. Mr Munatsi concedes that the way he ran his business at the time was chaotic; he did not have a good grasp of what level of income he was making and did not in our view apply time or effort to checking whether what the accountant had put on the return tallied with what he was actually making. As far as the allegation made against him was that the inaccuracy in his return was deliberate we accept that it was not. Similarly as regards the reporting of information in relation to the foray into car exports we accept Mr Munatsi's account that he believed the business was not profit-making and that he thought he therefore did not need to disclose details of it to his accountant. Any inaccuracy in failing to disclose the profit was again not deliberate. While HMRC highlighted Mr Munatsi's evidence indicated that the person he had dealt with was fraudulent the significance of this should not be overstated as it was clear to us Mr Munatsi was only able to come that view with the benefit of hindsight. Also the minimal level of documentation and due diligence Mr Munatsi carried out was not wholly out of keeping with the unregulated nature of the trade being entered into.

63. In relation to the fact Mr Munatsi chose not to challenge the penalty, it is clear from his evidence, and there is nothing to suggest the contrary in the correspondence, that the penalty was settled for reasons of expediency and to alleviate the stress and depletion of financial and time resources he felt he would otherwise have to use up in fighting on. In these circumstances the fact the penalties were settled did not mean Mr Munatsi accepted the inaccuracy was deliberate and does not undermine our view that it was not. While there was a disputed issue of fact over whether Mr Thevarajan had said anything about the implications of settling the penalty (Mr Munatsi maintains he was told the penalty would not affect his credit history whereas Mr Thevarajan said did not recollect anything being said) we do not make a finding on the matter given its tangential relevance.

64. In finding the inaccuracies were not deliberate it must however be recognised that the fact he was not aware that, as regards the commission income, a significant proportion of his income did not appear on his return, amounted to a serious dereliction of his responsibilities as a taxpayer. The lack of care he took to ensure his return of income was accurate fell well below what would be expected of a reasonable taxpayer. These shortcomings cannot be ignored and we return to them when we assess their relevance to the issue of the "fit and proper" test further below.

65. In relation to the penalty charge for failure to comply with the information notice and the delays in providing the requested information these arose primarily in our

view from a failure to keep sufficient records in the first place, however having noted that we accept that the further delays in producing various statements arose from difficulties the appellant and his agent faced in obtaining the information from certain third parties. The appellant appeared to us be to be generally co-operative so far as it was in its power to be and we noted for instance that Mr Munatsi had facilitated HMRC's officer attendance at the business premises to examine the appellant's computer records in respect of its air freight business.

66. As regards the criticisms HMRC levelled against Mr Munatsi's conduct in carrying out certain transfers although Mr Munatsi helpfully elaborated on what he knew of the background to them they revealed a lack of appreciation of the increased kinds of money laundering risks associated with certain transactions and appeared to fall foul of Western Union's own policy guidance written in the form for "Do's and Don'ts". Mr Munatsi had understood the purpose behind the transfer of £43,205 over nine days for a customer whose documentation was in order and who he understood to be buying a house. On its face that appeared reasonable, although we note that Western Union's own guidance states under the "Main Don'ts" that customers are not allowed to split a transaction into small amounts. Of greater concern were the transfers of £8,503.31 and £7,822.76 where it appears to us that Mr Munatsi should have considered more carefully whether and how to proceed with the transaction even though the individual according to Mr Munatsi had passed Western Union's compliance checks. This was because the transfers were from the same individual but in circumstances where one transfer was under the individual's name and the other was under the individual's trading name. Furthermore they were transfers where Mr Munatsi knew the individual was himself conducting his own money transfer business and therefore knew that the money was not the individual's but that of the individual's own customer which thereby presented a higher risk from a money-laundering perspective. Western Union's "Main Don'ts" clearly state that third party transactions are not permitted, that the customer is only allowed to send his own funds, and that sending money for another person (called an economic beneficiary) should be refused.

67. We also take into account Mr Munatsi's experience and record on anti-money laundering compliance and the fact that he has functioned as an agent of Western Union and MoneyGram since 2008, has been subject to periodic compliance and training visits and that he has undergone on-line Anti-Money Laundering training on an annual basis. By Mr Munatsi's own account it appears that the systems and procedures he has in place are driven by Western Union and the prompts written into their portal system. Not unreasonably Mr Munatsi has not sought to go beyond what they have required. There is a concern that while his evidence that he intends to "cut and paste" Western Union's policies if he were to be registered is a pragmatic approach such an approach does not indicate to us an appropriate sensitivity to the importance of understanding the underlying rationale for the policy and risk involved and the need to tailor it to the specific risk profile of the appellant's particular business.

68. While Mr Munatsi is of the opinion, as is his accountant, that his record-keeping and financial management methods have been significantly improved and enhanced we did not have sufficient detailed evidence in the form of the documents and systems

in place to make a finding of fact to that effect. He drew our attention to the fact he had not received any compliance visit in relation to VAT but without knowing the frequency and triggers for such visits, we cannot draw any significant comfort from the absence of such a visit. We do not doubt however Mr Munatsi's desire and commitment to make improvements as evidenced by his decision to undertake and work towards completion of an Open University BA Hons degree in Business Studies and Law. Although a number of character references were provided, we can accord these only very limited weight. None of the referees attended to give evidence and in any case another person's opinion of the applicant would be no substitute for the tribunal's own assessment of an appellant taking account of the appellant's evidence and findings of fact that could be made about what the appellant had said and done. As we have stated above we found the appellant to be an honest and credible witness of fact. His openness in acknowledging his shortcoming and the efforts to enhance his skills and education while still running and expanding his business are commendable.

69. It falls to us then to consider all the above factors in the round. As we have noted above while the errors which gave rise to the penalties in 2010-11 and 2011-12 were not deliberate they did arise from a significant degree of carelessness. Not being aware that a significant proportion of income was omitted is a serious matter and the fact of that must weigh against him but less so than if the error was deliberate. Carelessness in complying with tax responsibilities may be relevant to whether a person complies with responsibilities in other areas and it can be seen that the lack of care filtered through, to a lack of circumspection around certain money transfer transactions. While the term rehabilitation is perhaps not apposite where the relevant behaviour in issue is a lack of awareness, rather than behaviour which is dishonest or has such connotations (that is not the case here) what is relevant is the extent to which an applicant has learned from their omission and what steps have been taken to expand their knowledge making it less likely that they will be in situations where their conduct does not fall below what is reasonably expected.

70. While some time has now passed, since the under-declarations, as Mr Munatsi was keen to emphasise, and he has taken steps to improve his awareness of his responsibilities, our conclusion, on the basis of the evidence that was before us at the hearing was that Mr Munatsi is not yet at a stage where we feel able to resist HMRC's submission that he does not meet the "fit and proper person" test with regard to the risk of money laundering or terrorist financing. We must therefore dismiss his appeal.

71. We should say that in our view there will come a point, if Mr Munatsi maintains the trajectory that he has put himself on, where he will be able to demonstrate that he has addressed the lack of awareness that gave rise to the penalties, and assuming evidence can be provided of the documents and systems he has put in place, he will hopefully then be in a stronger position to make an application for registration with better prospects of success. If necessary he would be advised to point to the Tribunal's findings in this decision that 1) he was a credible witness of fact and 2) that the inaccuracies in the tax returns which gave rise to penalties were not on the evidence before the Tribunal deliberate inaccuracies as had been assumed by HMRC. On a cautionary note, although Mr Munatsi indicated at the hearing that he felt that armed with his business and legal qualification he could interpret the law on anti-

money laundering compliance without having to consult others he should appreciate that there may well be situations where it would be wise to clarify the relevant compliance requirements and seek appropriate advice rather than be totally self-reliant.

72. By way of postscript it appears to us that the way HMRC have set up their decision making process on the "fit and proper" test still does not pay due regard to the spirit of the recommendations made in the Tribunal's decision *Hunt* which was issued back in 2014. We note that regarding the convictions stipulated in the regulations at the time paragraph [10] of the decision in *Hunt* had set out a list of factors in relation to which it was suggested there was a duty to consider with a view to enabling HMRC to consider the impact of rehabilitation: the relevance of the conviction to the duties the applicant was to perform, the nature of the business concerned, the record since conviction. The factors included the person's employment history, personal conduct, and the length of time since conviction. In this case where the conduct relied on was deliberate inaccuracies, HMRC would similarly be duty bound to make further enquiries as to the circumstances of the conduct giving rise to the penalty and seek further information from the applicant as to his or her background and subsequent activities so as to be able to properly consider the extent of rehabilitation. We note that the latest iteration of the Money Laundering Regulations (The Money Laundering Regulations 2017) re-introduces a list of offences in relation to which, if a person is convicted, their registration must be refused. But to the extent that list is not exhaustive, and there might be other offences or historic conduct which was relevant to the question of "fit and proper", the imperative to put convictions or any conduct relied upon in their proper context, by taking account of the facts and circumstances which have arisen since, is just as applicable.

Conclusion

73. For the reasons set out above we are satisfied HMRC have demonstrated the appellant does not at this point pass the "fit and proper" test. The appellant's appeal is dismissed.

74. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 07 AUGUST 2017